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***Borderless skies!***  
**Sovereign dominance, regionalism: Lessons from Europe**

**Abstract**

Transport shrinks the world and none more so than aviation. But achieving borderless skies is problematic, mostly due to a legacy lacking trust and the recognition of vulnerability from the skies. Commercial air transport, whilst little more than 100-years old, continues to battle a nemesis stemming back centuries - linked to warfare and predictably the protection of boundaries and borders. Regional cooperation arguably provides valuable stepping-stones to achieving the goal of a borderless world wherein nations co-exist in peace and tolerance. This year (2017) marks the 60th anniversary of the Rome Treaties and this paper reviews the significance of EU regional unity, particularly on policy development in transport and specifically, aviation, which, enhances, not only regional integration but, inevitably, facilitates international cohesion. The research is based upon a mixed method/interdisciplinary approach, predominately with the focus on a socio-legal qualitative review. Commentary spans the period 1648 to the current date in – borderless skies: *lessons from Europe*.

**1. Introduction**

State boundaries and borders continue to change and move, mostly due to acts of aggression, revolution and declarations of independence. Rarely are such changes amicably achieved and disputes over territories are known to continue for decades, leading to acts of on-going hostility. National sovereignty is still protected; yet, in an ever-increasing globalized society, recognition must be given to the fact that cooperation and collaboration are key necessities in securing peace and achieving the integration of a world society.

In the last fifty years the links between nations and regions have grown and developed. Key to this has been on-going communications, which have been enhanced by technology, such as the Internet and evolving transportation systems. Aviation in particular is viewed as a critical factor resulting in global linkage, enhancing and developing the concept of globalization. Globalization has resulted in a '*shrinking*' world, one of opportunity and the accessibility to new markets. Human mobilization remains a significant factor in realizing equity in global development and economic prosperity.

That said, whilst the skies may, technically, be viewed as 'borderless' the ability to freely fly is often restricted by the lack of international cooperation. This paper considers the aspect of international cooperation and the associated challenges of such, with particular focus on sovereignty and state protectionism, which have limited access to the sky.

The concept of world governance is therefore considered, particularly in terms of international aviation law, which is seen to have limitations, due, in the main, to a lack of trust. This stems back to an inherent legacy of inviolable sovereignty of states.

This paper provides a unique view and understanding of historical legacies, which affect today's development of air transport, for, whilst commercial aviation is little more than a 100-year old, it continues to battle old nemeses that impede the development in today's modern times.

The importance of regionalism is reviewed and the significance of regional cooperation is discussed in terms of being a significant factor and 'key stepping-stone' in achieving borderless skies with unfettered access across the world. This year (2017) marks 60-years of the Rome Treaties, which have been instrumental in creating the longest period of peace in written history within Europe. The Treaties of Rome established a common market where people, goods, services and capital can move freely leading to prosperity and stability for European citizens. Key to this has been the transport policy. 2017 also significantly sees 25-years of the EU Internal Market for Aviation, and ultimately this paper discusses the development of air transport – *lessons from the EU*.

The research is based upon a mixed method/interdisciplinary approach, predominately with the focus on a socio-legal qualitative review, which presents the factual, chronological background, including the development of the European Union (EU) and the aviation transport and policy framework. An outline of the international aviation dimension is undertaken, particularly in regard to the Convention on International Civil Aviation, which was agreed in the midst of the Second World War. This provides contextualization as to the position and achievements of the European Union. The wider principles of the European Union regarding market integration are also considered.

## **2. Sovereignty**

The composition of the world, in terms of recognized countries, boundaries and borders has often changed, just as the political world also continues to do. The words 'country' and 'nation' are frequently interchanged for what political scientists call a 'sovereign' state and thus defining a sovereign state in itself remains controversial.<sup>1</sup> The concept of sovereignty is traceable back to an era of extended warfare in Europe, with the principle of 'sovereignty' being the crucial element in the Peace Treaty of Westphalia (1648).<sup>2</sup> This transpired after a thirty-year period of war in Europe, whereby The Treaty legitimized the rights of sovereigns to govern *their people* without external interference from other foreign or international powers. This therefore provided the 'presumption' that independence, and even possibly isolation, of a state would prevent future wars.<sup>3</sup> Arguably, in essence, however, it also laid a stake of claim to each citizen born within its territory.

This concept, within a recognized legal system, ultimately became 'the cornerstone of the modern system of international relations,'<sup>4</sup> whereby, the current system of states has become the established 'dominant world order framework.'<sup>5</sup>

### **2.1. Dominance of Nations: protecting and increasing Sovereign rights**

There has always been a symbiotic relationship between war and destruction, and consequently development and advancement, both in terms of legal/legislative and physical/technical progression.<sup>6</sup> Wars have always concerned dominance and supremacy, so it of little surprise that the principle of sovereign rights has its roots

traceable back to a war.<sup>7</sup> Balancing power globally has constantly seen endless wars whereby other States have constantly intervened either to protect their own interests or those of another nation. The First World War (WWI:1914-1918) is viewed as substantially changing the political order and international environment, by creating a forum for interaction and regulation, and for the resulting dissolution of the former empires and related systems of hierarchy. It was also a war that saw the skies being increasingly used for both surveillance and showing the potential of attacks from the air – particularly, from the newer transport mode, the aircraft.

The Paris Peace Conference of 1919<sup>8</sup> formally ended WWI and led to the eventual drawing up of the League of Nations.<sup>9</sup> President Wilson staunchly supported the idea of a League to maintain world peace, however the US was never to sign it due to internal political friction in the USA between the visionary Wilson and the Republican leader of the Senate, Henry Cabot Lodge. The same year was also to see the drawing up a Convention Relating to the Regulation of Aerial Navigation for aviation<sup>10</sup>. This Convention was the first multilateral instrument of international law<sup>11</sup> relating to air navigation and, was key in laying the very foundations for the present Convention on International Civil Aviation,<sup>12</sup> whilst, also importantly, formulating the principles of the domestic law of the contracting States.

International law is concerned with the political will of States as expressed through treaties or international custom, and provides the means by which contracting States stipulate the rules of private law, which is then agreed within their national law. This unified system approach is ultimately viewed as a mechanism to prevent and minimize conflicts, both from a physical and legislative perspective. From a legal stance, international law provides a mechanism to replace the disparity that exists regarding substantive law and jurisdiction, clarifying mutual rights and obligations whilst providing transparency.<sup>13</sup> However, international law has limitations as Arend<sup>14</sup> reaffirms, *‘sovereignty means that all states are juridically equal...they can be bound by law only through their consent. In the absence of a law...they are legally allowed to do as they choose.’* Successful implementation therefore means that States have to be *willing* to formulate, accept and adhere to practices and hence international laws. Inevitable this remains a clear challenge and a weakness of international law.

The Montevideo Convention on Rights and Duties of States (1933) provided that there were several components of “The State as a person of international law,” namely: *“(a) a permanent population, (b) a defined territory, (c) government, and (d) capacity to enter into relations with other States.”*<sup>15</sup>

However, boundaries and borders are frequently disputed, the recognition of State jurisdiction and even ownership of territories inevitably leads to challenges in terms of international claims and right. This inevitably challenges both regional and world peace.

Territorial jurisdiction was important to the early discussions relating to access to the skies. Guidance, as to the principle of exclusive territorial jurisdiction however, has its foundations in maritime law, for example, relating to rights of passage and State jurisdiction. The 1982 Laws of The Sea, provides that,

*‘Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.’*<sup>16</sup>

That said, territorial waters have also been widely disputed. The registering of the objection by Israel in the earlier 1958 version<sup>17</sup> typifies the aspect of sovereign conflict in this respect; and, it should be furthermore noted that there have been numerous disputes concerning the extent of the territorial sea, which has ranged from three to 200 nautical miles.

It is perhaps little surprising that this type of state protectionism also manifests itself in relation to aviation and ownership of the air. Historically, this preceded the existence of aircraft and therefore was linked to property rights – the ‘ownership’ of air space above land. A doctoral thesis attributed to Johannes Stephan Dancko<sup>18</sup> commented that the air actually belongs to everyone but added that the Duke (in the context of the dissertation) had inherent rights. This only too clearly serves to show the importance of sovereignty, whereby ‘ownership’ has been linked to both individual landowners and the sovereign rights of a State.<sup>19</sup>

The British, for example, had always taken some confidence, in the fact, that, as an island landmass, it had defined boundaries and therefore was secure, to an extent, from land-based attacks. But the crossing of the English Channel by Louis Bleriot in 1909, reinforced the vulnerability of the country (England, Scotland and Wales) from the air - it was no longer viewed as a protected island, but a sovereign state vulnerable to air attack. This view was no doubt brought home only too clearly in subsequent wars, where air power was to become a significant tool in warfare, starting with the earlier use of military balloons up to the modern day use of fighter planes – and beyond, to a possible future attack by drones (UAV’s).<sup>20</sup> Airspace was hence to be closely guarded and protected by States who declared sovereign control of the airspace above their territory.

## 2.2. The Convention on International Civil Aviation<sup>21</sup>

The current Convention on International Civil Aviation, the Chicago Convention, also transpired in a period of world war aggression, the Second World War (WWII – 1939-1945), which saw nations across the world being divided into two opposing sides, the Axis Powers, which included Germany, Italy and Japan, and the Allies side that included Britain (and its colonies) France, Australia, Canada, New Zealand, India, the Soviet Union, China and the United States of America.

With the Conference being held prior to the end of the war in 1944 there was naturally differing viewpoints as to access to the skies above States – who remained concerned as to the havoc that could be reeked from above.

The Convention states in the Preamble that,

*‘...the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world....’* And that *‘it is desirable to avoid friction and to promote that **cooperation** between nations and peoples upon which the **peace of the world depends.**’*

However, emphasis is also accorded to the concept of States’ Sovereign rights, (Article 1) which recognizes that each contracting state has (or retains) complete and exclusive sovereignty over the air space above its territory.

In terms of defining 'territory,' the Chicago Convention provides a definition in Article 2, namely, it 'shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State,' hence reinforcing the linkage back to maritime transport and Laws of the Sea.

Hardly surprising perhaps, consensus could not be achieved on contentious issues and where stumbling blocks remained the Convention lay silent, or was non-specific, for example, in terms of traffic rights in international scheduled carriage by air. As a consequence two distinct instruments, in the form of Agreements,<sup>22</sup> were appended to the Convention, which concerned the exchange of rights on a reciprocal basis, known as "Freedoms of the Air." It was therefore left to individual States to mutually exchange reciprocal commercial rights, with Article 6 providing that,

*'No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.'*

### ***The International Air Services Transit Agreement***

The International Air Services Transit Agreement refers to two freedoms, which are deemed to be of a basic/technical nature, namely:

1. the privilege, granted by one state to another state, to fly across its territory without landing;
2. the privilege to land for non-traffic purposes.

Due to the nature of these freedoms, most States at the 1944 Conference were content to endorse these privileges. These are replicated in the second of the Agreements, which sees the introduction of three further privileges of a commercial nature.<sup>23</sup>

### ***The International Air Transport Agreement***

3. the privilege granted by one state to another, to put down, in the territory of the first, traffic (passengers, cargo, and mail) which comes from the home state of the carrier;
4. the privilege granted by one state to another to take on, in the territory of the first, traffic destined for the home state of the carrier;
5. the privilege granted by one state to another, to put down and to take on, in the territory of the first state, traffic coming from or destined to a third state.

Since the Conference, State signatories recorded as having ratified or notified adherence with the Convention has increased by 139 States to 191; however, the endorsement of the commercial Agreement remains at only 11 States. With the less controversial basic Agreement now having 130 signatories.<sup>24</sup>

Milde<sup>25</sup> stresses the fact that Article 6 (cited above) of the Convention has been an 'obstacle to the global liberalization of air transport services.' However, in practice 'special permission or other authorization' is usually reciprocally exchanged between States in the form of bilateral air service agreements, whereby parties negotiate their own terms in the form of "trade agreements." Once again this emphasizes, that internationally, there has not been a consensus of agreement or a consistency of approach.

“Cabotage”<sup>26</sup> commonly refers to the rules and regulations concerning the carriage of passengers and/or goods for hire or reward that is carried out by non-resident operators (registered in another country, i.e., the nationality of the airline) in a host State/country. And, in respect to this, Article 7 of the Convention, states that,

*‘each contracting State has the “right” to refuse permission to the aircraft of other contracting States to carry in its territory passengers, mail or cargo for remuneration to other points within its territory.’*

Therefore cabotage remains a ‘right’ or ‘privilege’ granted to a foreign State or foreign carrier to carry revenue producing traffic from one airport of a State to another in the same territory/State.<sup>27</sup>

It is frequently believed that the Chicago Convention prohibits cabotage. In fact the phrasing reaffirms that States have a choice, the choice to refuse; hence, there is nothing in the Chicago Convention to prevent the contracting states from advancing with liberalization, a subject of much debate producing a multitude of related publications.<sup>28</sup> The so-called ‘nationality clause’ have been embedded in most bilateral air service agreements also due to ‘restrictive’ government choice. This clause has its roots in to the *International Air Services Transit Agreement* and the *International Air Transport Agreement*. However, Article I, section 5 and 6 of the respective Agreements merely states,

*‘Each contracting state reserves the right to withhold or revoke a certificate or permit to an air transport enterprise of another state in any case where it is not satisfied that **substantial ownership and effective control** are vesting in the national of a contracting state, or in the case of failure of such air transport enterprise to comply with the laws of the state over which it operates, or to perform its obligations under this Agreement.’*

The 1944 Convention was also to lead to the creation of the International Civil Aviation Organization (ICAO) which is a specialized agency of the United Nations and was to be the lead of global aviation policy. However, as the above two ‘Agreements’ demonstrate, reaching global consensus in aviation has continued to be problematic. Arguably, the willingness to show adherence to a more competitive and liberalized approach to global commercial air operations is reflective of further State protectionism. This only too clearly also demonstrates the limitations of International law in reaching global agreement and ultimately to opening up the skies.

### 3. Global change

In 1944 the phenomena of globalization was not really evident, certainly not in the same way it is today. “Globalization,” as a buzzword, has only really however, became commonplace during the last few decades.<sup>29</sup>

The Financial Times defines globalization as a ‘process by which national and regional economies, societies, and cultures have become integrated through the global network of trade, communication, immigration and transportation.’<sup>30</sup>

Whilst international interaction is not a new concept and whilst there maybe differing theories as to when globalization started, emphasis is consistently given to the

significance of transport in the equation. The movement of people and goods depends upon transport.

The first commercial, scheduled airline flight occurred just over 100-years ago and it is unlikely that the predicted growth was foreseen or anticipated at that time. The world has certainly changed in this 100-year period, and aviation has played a significant part in this advancement, integrating people, organizations, and governments around the world. But this said, aviation has had a key role in acts of hostility too – used as both a military tool and as a weapon of mass destruction (in its civil capacity) at the hands of terrorists. However, due to its uniqueness as a transport mode, it has also undertaken acts of salvation, bringing aid and relief to many across the world. Aviation has undertaken a pivotal role in humanitarian intervention, reducing global poverty by creating international distribution routes that unit people and continents. Consequently, there can be little doubt that aviation in particular has been instrumental in advancing globalization through international connectivity and accessibility to new markets and opportunities.

The transportation of data and world-wide communication systems that operate through the cyberspace and ether systems is widely accepted and utilized today. Arguably this modern technology has resulted in borderless structures such as the World Wide Web, where systems are shared and accessed from all over the globe. But somewhat ironically, whilst there are no physical boundaries in the sky, there remains a reluctance to provide the same ‘freedom’ to aviation and to the air and space it utilizes.

#### **4. International cooperation**

The Organization for Economic Cooperation and Development<sup>31</sup> (OECD) states that the main objective of global policy cooperation is to ‘*encourage countries to adopt mutually reinforcing policies on the joint evaluation of the external implications of their domestic actions.*’ Countries and international organizations therefore seek to address common challenges in order to achieve shared goals. A primary theoretical concept underpinning economic global policy cooperation is normally one of ‘market failure.’ Policy intervention can therefore contribute to rebalancing demand, hence, collaborative action is able to mitigate for incentives that lead to either over consumption or under-provisions.<sup>32</sup>

The degree and level of cooperation and partnership arrangements however varies, not only in terms of regions and nations, but policy areas also. One common challenge remains the balancing of sovereign and nations rights. International cooperation has become instrumental in aiding stability to areas that have previously witnessed armed conflict and political unrest. Global cooperation, by its very nature, is difficult to universally achieve, despite the existence of international bodies such as the United Nations (UN) and its predecessor, the League of Nations. Both organizations have their roots linked to warfare and the recognition that to advance peace, there needed to be collective consensus translated and transmitted through a world organization, and, hence, a united approach of states to governance in the world system.



This concept of world governance is far from a new concept with evidence of such proclamations with the writing of Dante Alighieri.<sup>33</sup> H.G. Wells,<sup>34</sup> argued that a peaceful world necessitated '*not merely a political but a profound social revolution.*'

Inevitably issues of trust, fear, sovereignty, control, dominance, etc., all have to be resolved in order to achieve collective action, be it of an international or regional nature. And for aviation this remains a significant challenge, certainly internationally and particularly from a commercial perspective. That said, the EU has made significant achievements at regional unity, which has led to enhanced openness and freedom within the skies above the current 28 nations that form the European Union (EU).

## 5. Regional cooperation – the EU

It is often understood that the idea for a European Community was a new concept after WWII; this is not the case, merely, the war provided the impetus for the creation of such. It was, as Barnard<sup>35</sup> describes, '*the driving force behind the European Union.... the consolidation of a post-war system of inter-state co-operation and integration that would make pan-European armed conflicts inconceivable.*' Craig and De Búrca<sup>36</sup> refer to the fact that there were calls for a European Parliament before the war, referring even to the identification of such by William Penn in 1693, who called for an end of the 'state mosaic' in Europe.

There can be no doubting that having come through a divisive war, that the societies of the European countries had reason to be supportive of the 'unification' call. It has been interpreted that this integration approach was as a direct measure to replace what was described as '*the forces of national chauvinism*' which had caused the Second World War and hence the chaos and destruction of this period within Europe.<sup>37</sup> It is debatable whether the war should be interpreted as the social revolution that H.G. Wells described and rationalized, but the war, nevertheless, did lead to the social evolution that resulted in the development of a unified Europe. Hence, the 1950's heralded the new model, away from the traditional concept of Westphalian sovereignty, where sovereignty could be conceded (in parts) for the benefit of the functioning of the supranational institution – which was ultimately to become the European Union.

2017 marks the 60<sup>th</sup> anniversary of the Rome Treaties. In this period, the 'Union' has been established, 'a union' that promotes peaceful cooperation, respect of human dignity, liberty, democracy, equality and solidarity among European nations and peoples.

At the 60<sup>th</sup> anniversary celebration on 25 March Commission President Jean-Claude Juncker made reference to the fact that,

*"[Our] parents and grandparents founded this Union with one common vision: never again war. It was their strong conviction that breaking down barriers, working together – and not against each other – makes us all stronger. History has proven them right. For 60 years, the values on which this Union is built have not changed: peace, freedom, tolerance, solidarity and the rule of law bind and unite us. They must not be taken for granted and we*

*must fight for them every day. Our democracy, our diversity and our independent and free press are the pillars of Europe's strength – no individual or institution is above the law. The European Union has changed our lives for the better. We must ensure it continues to do so for those that will follow us. For now, all roads lead to Rome. After Rome and however it is paved, there is only one way forward: European unity."*

This said, it is perhaps with some irony that, only the year before, the Member State of the United Kingdom, through its 'Brexit' vote (in 2016) seemed to cast doubt on the success and arguably the values of this unified approach. The referendum decision, seemingly, indicating support for a return to the 'island-mentality' and a more insular, isolated approach.<sup>38</sup>

In 2014 there was a warning given by the then deputy Prime Minister of the UK, who uttered similar wording in terms of actions which had led to WW-II, describing "forces of insularity and chauvinism" which were beginning to dictate Britain's future in Europe.<sup>39</sup> Clegg, expressed the view that those wanting to leave the EU, were "false patriots" who would seek to leave the UK isolated and weakened adding, "[i]f the forces of insularity and chauvinism get their way, they will ensure that Britain no longer benefits from the political and economic advances in Europe that we have shaped...." "The great irony behind the claim that we should leave the EU because it is somehow anti-British is that we would be doing so just as the big principles we have long advanced - openness, competition, free trade, are enjoying greater continental consensus than ever."

However, after some 44 years of reaping positive benefits as a result of EU membership – and all that it brings (including more open skies across Europe) the UK looks set on a path that inevitably will see the nation returning to more sovereign control – including of 'its' borders and 'its' movement of people.

### 5.1. Origins and beginnings

The Schuman Declaration<sup>40</sup> laid the foundations for what was to become the European Coal and Steel Community with the ECSC Treaty being signed in 1951.<sup>41</sup> In 1957, the Treaties of Rome established the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM).<sup>42</sup>

As Craig and De Búrca<sup>43</sup> stress, the process of European integration occurred in many stages. Over time the reach of the Community has also expanded, with increased revisions and integration through successive Treaties. This has led to the now termed European Union, which now consists of 28 Member States. (See Table 1: EU development timeline.)

Year	Treaty Developments	Member State(s) - Accession
1951*	Treaty establishing the European Coal and Steel Community	Belgium, Germany, France, Italy, Luxembourg, Netherlands
1957*	(i) Treaty establishing the European Economic Community (ii) Treaty establishing the European Atomic Energy Community	Belgium, Germany, France, Italy, Luxembourg, Netherlands

<b>1973</b>		1 <sup>st</sup> enlargement - Denmark, The Republic of Ireland, United Kingdom join
<b>1981</b>		2 <sup>nd</sup> enlargement - Greece
<b>1986*</b>	Single European Act (entered into force 1 July 1987)	3 <sup>rd</sup> enlargement - Spain and Portugal become members
<b>1992*</b>	Treaty on European Union - Maastricht Treaty (entered into force 1 November 1993)	
<b>1995</b>		4 <sup>th</sup> enlargement - Austria, Finland and Sweden in 1995
<b>1997*</b>	Treaty of Amsterdam (entered into force 1 May 1999)	
<b>2001*</b>	Treaty of Nice (entered into force 1 Feb. 2003)	
<b>2004</b>		5 <sup>th</sup> enlargement - Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovakia and Slovenia.
<b>2007*</b>	Treaty of Lisbon (entered into force 1 Dec. 2009)	6 <sup>th</sup> enlargement - Bulgaria, Romania
<b>2013</b>		7 <sup>th</sup> enlargement - Croatia

\*Refers to date Treaty was signed (Source: Author)

**Table 1: EU development timeline**

## 5.2. How it works

The Treaties constitute the European Union's 'primary legislation' laying down the fundamental features of the Union, in particular the responsibilities of the various actors in the decision-making process, the legislative procedures under the Community system and the powers conferred on them. The Treaties are subject to direct negotiations between the governments of the Member States, after which they have to be ratified in accordance with the procedures applying at national level. A Treaty lays down basic aims and principles, (including specifying the distribution of power) in order to carry out the objectives within. Secondary legislation is defined as the totality of the legislative instruments adopted by the European institutions pursuant to the provisions of the Treaties. This comprises of both binding legal instruments (regulations, directives and decisions) and non-binding instruments (resolutions, opinions) provided for in the Treaty. The EU also utilizes other mechanisms, such as the institutions internal regulations and action programs.

Article 1, of the Treaty on the European Union states that in order to '*establish among themselves a EUROPEAN UNION, hereinafter called 'the Union,' on which the Member States confer competences to attain objectives they have in common.*'

Article 4, of the Treaty on the Functioning of the European Union (TFEU) refers to shared competences between the Union and the Member States and included amongst these are areas relating to:

- (i) the internal market;
- (ii) social policy, for the aspects defined in this Treaty;
- (iii) economic, social and territorial cohesion;
- (iv) environment;
- (v) consumer protection;

- (vi) *transport*;
- (vii) *trans-European networks*;

As can be seen, transport is an identified area but also overlaps with many other identified areas (including energy and justice, security and freedom).

Article 3 TFEU stipulates the area of exclusive competency, which includes the area of competition rules for the functioning of the internal market.

The Union must act within the limits of its powers and must apply a legal basis for every legal act it adopts. Throughout the Treaty frequent reference is made to the areas where the Union has competence to act (such as humanitarian aid, areas of enhanced cooperation, as within Title III, etc.).

### 5.3. EU - Free movement

The primary purpose of the Treaty establishing the European Community was to bring about the gradual integration of the States of Europe and to establish a common market founded on the four freedoms of movement (for goods, services, people and capital) and on the gradual approximation of economic policies. Whilst the principle respects the individualism of the nations – it is based upon removing boundaries and ultimately border.

The objective behind a single market has always been to bring down barriers and simplify existing rules, thus enabling citizens in the EU to make the most of the opportunities offered to them by having direct access to the now 28 countries that comprise of the EU. Arguably transport has a key, significant part to play in realizing this goal and ultimately providing the freedom to ‘its people’, which retain the nationality of their own Member State, whilst also additionally being recognized as European citizens.

According to Balassa<sup>44</sup> there are different stages of integration. (See: Table 2 Integration of States).

Name of integration	Abbreviation	Level of cooperation
<i>Free Trade Area</i>	<b>FTA</b>	Member States remove restrictions to free movement of goods between themselves; each State retains autonomy to regulate trade relations with non-Member States.
<i>Customs Union</i>	<b>CU</b>	Member States establish a <b>FTA + common external policy in relation to non-Member States</b>
<i>Common Market</i>	<b>CM</b>	<b>CU + free movement of persons, services and capital</b>
<i>Monetary Union</i>	<b>MU</b>	<b>CM + single (shared) currency</b>
<i>Economic (Integrated) Union</i>	<b>EU</b>	<b>MU + single monetary and fiscal policy controlled by a central body</b>
<i>Political Union</i>	<b>PU</b>	<b>EU + central authority, setting not only the above, but is responsible to a central with sovereignty of a States government.</b> (Possible progression to foreign and security policies)
<i>Full Union</i>	<b>FU</b>	<b>Complete unification of economies with developed common policies, such as on income tax and social security.</b>

Table 2: Integration of States

(Based upon Balassa's stages, as provided by Barnard.<sup>45</sup>)

The initial desire to reach a CM however was far from a smooth and quick achievement. As late as the 1980's it was recognized that there was a delay and even failure in reaching a European Common Market stage of integration. This was ultimately due to Member States lethargy to reach decisions and due to differing national economies, which resulted in an uncompetitive and fragmented Community.

This recognition led to the first of the Treaty revisions since the Treaty of Rome, in the form of the Single European Act (SEA), which had the intention to create a frontier-free single market by the end of 1992. The SEA also repackaged the four freedoms within the newly named, 'internal' or 'single' market.

#### **5.4. The EU Transport Chapter<sup>46</sup>**

Transport remains a critically important chapter within the continuously evolving European Union. It is a fundamental cornerstone, forming the foundation on which the Union has invariably been constructed. Without an efficient and effective transport policy, one of the pinnacle objectives, the free movement of persons and goods, is seriously compromised, '*there can be no market without transport!*'<sup>47</sup> The primary objectives of the transport policy have always been aimed at completing the internal market for transport, ensuring sustainable development and meeting environmental challenges. This has included the development of the major networks within Europe, spatial management, the improvement of transport safety and security and the development of international cooperation. The current EU transport policy recognizes the need to build a competitive system that will lead to increased mobility, whilst removing further barriers.

Yet, for the first 30 years of the European Community, the transport policy<sup>48</sup> remained effectively under the control of individual governments, and it was acknowledged that, during this period, the European Community was either unwilling or unable to implement the Common Transport Policy (CTP) as provided by the Treaty of Rome.<sup>49</sup> In 1985 the Court of Justice<sup>50</sup> acknowledged that there was not a coherent set of rules and that, with regards to certain aspects of the transport policy, the Council had failed to fulfill its obligations.<sup>51</sup> A month later a program of legislative measures were introduced, the objective being to achieve an internal market by the end of 1992.<sup>52</sup>

However, the written text of the transport chapter, as created by the Treaty of Rome, essentially remains unchanged since 1957. Whilst, the significance of transport continues to evolve, overlap and combine with many other aspects of European Union policies, internally and externally, even the current, Treaty of Lisbon (TFEU) with a few minor amendments, has left the original transport phrasing virtually unchanged. In essence, this has shown the willingness of the Member States to embrace the concept of a more open environment within a democratic European Union. In the last 30-years, whilst the number of Member States has increased, there has been increased unity and readiness to embrace the concept of a borderless internal Europe.

Article 91 TFEU continues to emphasize the 'distinctive features of transport,' and although not specifically defining these, it is potentially an acknowledgement of the complexity of the transport sector. Transport remains both an ancillary activity to other sectors and yet it is also a major industry in its own right. Geographical and

historical factors also contribute to each States distinctive features, which has seen national transport policy and mode variances across the EU. The inevitable consequence is that such differing approaches have not historically been conducive to facilitating integration. Due to this the founders of the European Community were aware that the transport sector could not automatically be subject to every general rule set out in the EC Treaty and, for this reason, the objective was to work towards a Common Transport Policy (CTP).

Article 100 TFEU also identifies in respect to transport modes that the Transport Title *‘shall apply to transport by rail, road and inland waterway’* but that the *‘European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for sea and air transport.’*<sup>53</sup>

#### 5.4.1. EU Aviation – the internal process

The EU Commission acknowledged in a 2011 publication the value of air transport stating;

*‘Aviation serves the citizen, brings people together and delivers goods through seamless, safe and secure, cost effective transport chains, adding value through speed, reliability and resilience in a global network, over any distance, without negative effects on the environment. Aviation also contributes to society in other critical, non-transport areas such as emergency services, search and rescue, disaster relief and climate monitoring.’*<sup>54</sup>

In order to achieve this seamlessness and effectiveness, there is a need for a democratized approach. Transport, including aviation, has not always been as open to competition as it is today – liberalization has taken time to develop and has also come in notable stages.

Up until the 1980’s, individual Member States regulated their own domestic aviation policy with the intra-EU not being controlled by a single agency, as had been the case in the US. Most of the airlines with traffic rights within the EU were state owned, national ‘flag-carriers’ (such as British Airways for the UK) of a country. Owning or having a controlling share outside of a country was a taboo, and the State airlines often received subsidies from the state. This led to distortion of the market; a lack of opportunities; higher fares, etc., and ultimately did not comply with the very objectives of a single competitive and open market within the EU.

In 1978 the US led the way in their domestic deregulation process for aviation; however, the EU has since extended the principle through a series of successive packages of measures and reforms. This has covered air carrier licensing, market access and fares (see Table 3 – Summary of EU Deregulation Packages – key factors). Before 1987, and the EU reforms, aviation across the EU Member States, had been fragmented.

<p><b>First Package:</b> (adopted in December 1987)</p> <ul style="list-style-type: none"> <li>- Council Regulation 3975/87 on the Application of the Competition Rules to Air Transport</li> </ul>	<p>Summarized;</p> <p>This introduced the relaxation of established rules – for intra-EU traffic, limiting government rights re opposing new fares. It extended flexibility to</p>
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<ul style="list-style-type: none"> <li>- Council Regulation 3976/87 on the Application of the Treaty to certain categories of agreements and concerted parties</li> <li>- Council Directive 601/87 on Air Fares</li> <li>- Council Decision 602/87 on capacity sharing and market access</li> </ul>	airlines re-seat capacity sharing.
<b>Second Package:</b> (adopted in July 1990) <ul style="list-style-type: none"> <li>- Council Regulation 2343/90 on market access</li> <li>- Council Regulation 2342/90 on air fares</li> <li>- Council Regulation 2344/90 on the application of the Treaty to certain categories of agreement and concerted parties</li> </ul>	Summarized:  This extended market access, providing greater flexibility over fare setting and capacity-sharing. This led to the concept of ‘Community (EU) Carriers’ being developed and having the right to carry an unlimited number of cargo and passengers between their home State and other EU countries.
<b>Third Package:</b> (adopted July 1992) <ul style="list-style-type: none"> <li>- Council Regulation 2407/92 on licensing of air carriers</li> <li>- Council Regulation 2408/92 on market access</li> <li>- Council Regulation 2409/92 on fares and rates</li> </ul>	Summarized:  This introduced the freedom to provide services within the EU and in 1997 the freedom to provide ‘cabotage’: the right of an airline of one Member State to operate routes within another Member State.  Further reforms re: Public Service Obligation on routes, regarded as essential for regional development.

**Table 3 – Summary of EU Deregulation Packages**

Source: Author

The Third Package<sup>55</sup> remained applicable for 15 years until it was replaced by Regulation 1008/2008 on common rules for the operation of air services in the Community (‘the Air Services Regulation’<sup>56</sup>). The Air Services Regulation simplified and updated the Third Package setting out rules on:

- Market access;
- Public Service Obligations;
- The granting of and oversight of operating licenses for what became ‘Community (EU) Carriers’;
- Aircraft registration and leasing;
- Pricing and
- Traffic distribution between airports

#### 5.4.2. Defining ‘Open Skies’

Defining Open Skies is arguable a problematic aspect to specify, let alone to achieve, and hence, has been subject to differing interpretations.

ICAO applies the following definition Open Skies is “*a type of agreement which, while not uniformly defined by its various advocates, would create a regulatory regime that relies chiefly on sustained market competition for the achievement of its air services goals and is largely or entirely devoid a priori governmental management of access rights, capacity and pricing, while having safe-guards*

*appropriate to maintaining the minimum regulation necessary to achieve the goals of agreement”<sup>57</sup>.*

The International Air Transport Association (IATA) via its IATA Agenda for Freedom<sup>58</sup> emphasized that Open Skies provides for a higher degree of commercial freedom in Air Transport sector, particularly concerning the following aspects: (1) capital markets – especially on airlines ownership limitations; (2) number of airlines’ designations by a State; (3) traffic rights; (4) pricing; and (5) the needs for fair competition. In essence the international community strives to achieve this openness in aviation, but battles, in many instances, protectionism from countries – which strives to ensure that that country ‘benefits’ from collaborative ventures.

Whilst the definition of ‘Open Skies’ may vary, the principle remains ‘*to democratize aviation,*’ but that said, the approach is far from consistent, thus questionably not allowing the full aim to be achieved. The process nevertheless, provides a further stepping-stone within the process of full-liberalization.<sup>59</sup>

As can be seen from the EU’s internal approach (Table 4: Comparison of Open Aviation Area (OAA) and Open Skies) the EU has regardless extended this concept even further, so as to create a free open market amongst the 28 Member States, thus completing the model of openness in the skies (certainly that is, over Europe).

Type of Agreement	Freedom to set fares	3/4 <sup>th</sup> Rights	5 <sup>th</sup> Rights	7 <sup>th</sup> Right	Cabotage 8/9 <sup>th</sup> Rights	Foreign ownership and control	Regulatory Cooperation
Open Skies	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Cargo <input type="checkbox"/> PAX	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
OAA - EU (Internal)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

**Table 4: Comparison of OAA and Open Skies**

The EU internal aviation policy should be viewed as an exemplary example of a willingness to remove boundaries and borders, allowing greater competition for aviation operators across the EU. No other region has achieved this level of cooperation, which, in essence, benefits the market including the citizens of a united Europe.

Alongside marking 60 years of European unity through the Rome Treaties, 2017 has also marked the 25<sup>th</sup> anniversary of the *EU’s Internal Market for Aviation* in what has been described as a period where ‘new heights’ have been reached. *1992-2017: has Propell[ed] European Mobility Forward* due to the achievements through aviation.<sup>60</sup>

#### *5.4.3. EU Aviation – the external dimension: ‘Open Skies’*

The past decade (or so) has seen the gradual development of a more coordinated EU external aviation policy develop beyond the internal market. This has been a natural consequence of the internal dimension.

This said, the external competence of the EU has often been a controversial issue, in



terms of delineating the scope of the EU's internal and external competence. The EU was not expressly given legal personality when it was created but subsequent Treaty revisions have recognized this principle.<sup>61</sup> Agreements between the Union and third countries or international organizations are negotiated and concluded in accordance with Treaty provisions.<sup>62</sup> There are areas of express external competence in areas stipulated by the Treaty, which has expanded with successive Treaty revisions and now include areas of commercial policy; association agreements; the maintenance and relationship between the Union and external/international organizations – such as the UN, the General Agreement on Tariff and Trade (GATT), the OECD; cooperation with third countries, etc.

However, the status of the EU at times has also been contentious, for example, the EU did not come into existence until 10 years after the founding of ICAO and, whilst all EU Member States are members of the UN, the European Community has only had observer status at the UN since 1974. The status of the EU at ICAO remains questionable, not least by the EU, which has sought to obtain Community membership of ICAO as a single entity. Article 92 of the Chicago Convention states that it is only open to States, and therefore membership on a regional basis would necessitate an amendment to the Convention. Subsequently the consensus of the EU is that the role of the Community should be enhanced within ICAO.<sup>63</sup>

The early EU Court of Justice (CJEU<sup>64</sup>) case law made it clear that even when there was no express reference to competence, the Community has implied external competence. The so-called '*Open Skies*'<sup>65</sup> judgment of 2002 marked the start of an EU external aviation policy through the clarification of the distribution of powers between the EU and its Member States in the field of the regulation of international air services. Prior to this period bilateral agreements between States had been concluded on an individual basis but the judgment heralded, in essence, the arrival of the EU very much on the scene as a new 'important' player in the external aviation field.

The '*Open Skies*' litigation revealed that even when the Community had exercised its powers internally the CJEU was still prepared to apply the circumstances in a different manner in relation to the external implications. In this instance, the Commission brought an action against the respective Member States alleging that the Treaty had been infringed by individual Member States' entering into bilateral 'open skies' agreements. The Commission's argument related to the interpretation that the external competence rested with the EU in this area - based upon the principle laid down in the *Inland Waterways*<sup>66</sup> case, and as interpreted by the *WTO*<sup>67</sup> judgment. Whilst the CJEU disagreed to this reasoning, it was nevertheless concluded that the EU had external competence in line with the *ERTA*<sup>68</sup> ruling as internal competence had been exercised. In so doing, it was established that Member States, no longer had the right (either individually or collectively) to conclude agreements with non-Member States that would in effect, distort the scope of the EU including the breach of Article 43 EC<sup>69</sup> on the freedom of establishment. In concluding and applying an Air Service Agreement, on a bilateral *Open Skies* basis, which allowed an extension of rights to non-Member States, it was established that unlawful discrimination against other Community nationals was transpiring, whereby they were prevented from benefitting from the agreement and thus the benefits extended to the concluding States nationals. In essence the EU had to work collectively and in unison as 'one' –

so that neither State was advantaged or disadvantaged by another's action(s).

Since 2005 the EU has been extending its aviation policy beyond its borders, establishing an approach based upon three pillars (Table 5: The EU external policy as defined in the 2005 Road Map).

<b>1. Bilateral air service agreements</b>	<b>2. Common Aviation Area</b>	<b>3. Aviation Agreements with key strategic partners</b>
<ul style="list-style-type: none"> <li>•Pillar 1: applies the 'Open Skies' ruling through the revision of agreements not in line with the EU law (such as freedom of establishment, etc.) This ultimately implies the amendment of some 1,500 plus bilateral agreements of the MS's so as to encompass a more liberalized and horizontal 'equitable' approach</li> </ul>	<ul style="list-style-type: none"> <li>•Pillar 2: is aimed at the adoption of agreements with neighboring EU partners and the progressive opening up of markets and the phasing in of regulatory harmonization</li> </ul>	<ul style="list-style-type: none"> <li>•Pillar 3: concerns agreements negotiated by the EU with strategic partners and the extension of the open skies principles (as applied within the EU) - such as the EU/US agreements</li> </ul>

Source: Author (based upon the EU external policy aviation 'Road Map')

**Table 5: The EU 'three-pillar' external policy Road Map (based upon the 2005 definition)**

## 6. CONCLUSION

The EU development process, both in terms of regional cooperation and the establishment of a comprehensive aviation policy (internally and externally) remains unique. During its 60-years of existence peace has been preserved across the Union – in the time since the formation of the European Communities there have been no wars in Europe amongst the Member States. Relinquishing a degree of sovereignty and working collectively in unity has shown what is able to be achieved across States, whose history has been steeped in various wars with and against each other. It should be recognized that opening up borders to neighbors has been a positive move, whereby countries have appreciated each other's cultures and diversity, rather than seeing them as a challenge and a threat to their own. Aviation in particular has facilitated the sharing of heritage and opportunities across the EU. It has allowed trust to develop and ultimately peace to be assured. What was once used as an instrument of aggression in WWII, that led to a divided Europe, has undoubtedly been paramount in creating a unified and stable partnership of nations.

In essence, from an aviation perspective, it was the first time a group of countries established a comprehensive joint mandatory air transport policy. It also reaffirmed that mutuality could be achieved in respect to privileges advocated in Chicago in 1944 and that the barriers could be overcome through trust and political willing. The EU ultimately not only recognized these 'freedoms' but extended these further to include

the concept of full cabotage and an Open Aviation Area (OAA) within the EU. The primary driving force may have remained the establishment of a single market and the benefits accorded economically for the whole of the EU, particularly through equal and fair competition and opportunity, but most importantly the EU has shown the importance of aviation in terms of cooperation extending past a sovereign nation, into a regional grouping and arguably, with international standing too. Thereby clear recognition is accorded to the importance of air transport in driving the economy and furthering globalization and peace. Within Europe it has been a key enabler, one by which citizens across the EU have traveled extensively, both for social and commercial reasons with ease and in confidence (as to agreed standards and practices). 2017 acknowledges this success and achievement in terms of celebrating 25-years of the EU's Single Aviation Market, which revolutionized intra-European air travel. Borderless skies have not only developed, but been extended, due to the level of trust that has been gradually established. Whilst this has been viewed as conceding a degree of sovereignty, in reality, citizens have arguably benefitted further through the greater concept of European citizenship - an extension of their own state nationality and the freedom and opportunity it has accorded them.

The EU air transport framework (which includes air carriers, airports and the air traffic services) - consists of several other key areas, most of which are equally to be found within the mandate of ICAO:

- Safety
- Security
- Environmental issues
- Passenger rights and protection mechanisms
- Social factors
- Air Traffic Management

However, unlike the collective body of ICAO members, the EU has shown that it is possible to achieve greater consensus, and acceptance in these areas - if only, largely from a regional perspective. Although viewed as stalling in the first 30-years of its existence, during the last 30-years, the EU has demonstrated that regional integration is possible and that extended liberalization can bring benefits regionally and arguably globally too, that is, 'if' *sovereign protection* can be overcome for the greater good of citizens. Within the EU, nationality restrictions and clauses (in most policies) have been removed and this has been translated through to the EU aviation (Community) Carrier concept, much in the same way as European citizenship exists for individuals. In essence, the EU has created one OAA amongst its Member States, which has extended the premise of Open Skies.

Whilst variants of the EU model may have since been adopted in other areas across the world, these have invariably not been so extensively replicated or applied in other regional cooperative mechanisms. This has however, nonetheless, resulted in pockets of Open Skies gradually developing across the globe; and, this should be viewed as a meaningful step and a 'key factor' in achieving the aim of borderless skies with unfettered access. Inevitably, this should be seen as significant to realizing the goal of a world without borders, where human mobilization is significant in realizing global economic prosperity and where nations co-exist in peace and tolerance. In essence, this is the clear message emanating from the development of the European Union and

at a time when the Union celebrates its 60<sup>th</sup> birthday and all that it has achieved.

However, this said, international reticence still exists and globally we are far from fully borderless skies. The crux of it is, the world hangs on to a legacy of distrust, and whilst aviation joins the world in so many ways, the memories of warfare and vulnerability from the sky remains a constant battle that is still to be overcome.

For the most part, sovereign control has artificially drawn borders and boundaries in the skies above us, which inevitably impedes economic development and equity in competition. The Union in Europe has been successful in removing these lines and limits. But, the separation of the UK from the EU only too clearly echoes how fragile relationships and bonds can be, even amongst neighbors and allies, which have reaped benefits of open access and internal markets, including across the European skies.

There is no doubt that during the continuing discussions on the UK's exit from the EU, the UK will want to retain unfettered and open access in the same way it currently has within Europe, including being a member of the horizontal agreements outside of the EU. The difficulty here is perhaps achieving a happy medium whereby there is respect for the states individuality (measured against legitimate limits on power) balanced against market integration and citizens' and business opportunities.

That said, the underlying lesson from the European Union and its relatively short history, is that regional cooperation and the development of aligned, joined and shared policies can become a reality: *integration of nations is possible, if not complex!* .... And, in time, this could feasibly be extended into international Open Skies and access opportunities, but only *when there is political willing to do so!*

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<sup>1</sup> Jens Bartelson, *The Concept of Law* – Revisited. EUR. J. INT. LAW. 17 (2): pg. 463-474 (2006).

<sup>2</sup> Treaty of Westphalia 1648 [http://avalon.law.yale.edu/17th\\_century/westphal.asp](http://avalon.law.yale.edu/17th_century/westphal.asp) [Accessed 30 January 2015]

<sup>3</sup> Eric Engle 'The Transformation of the International Legal System: The Post-Westphalian Legal Order.' QLR 23 (2004)

<sup>4</sup> K. J. Holsti. *Peace and War – Armed Conflicts and International Order* (1991). See also the 350th anniversary of the Peace of Westphalia: K Bussmann and H Schilling (eds), *1648: War and Peace in Europe*. Vol. 1. (1998).

<sup>5</sup> R. A. Falk, *Law in an Emerging Global Village: A Post-Westphalian Perspective* (1998).

<sup>6</sup> Sarah Jane Fox. *The evolution of aviation in times of war and peace: blood, tears, and salvation*. International Journal of World Peace. Vol. XXXI No. 4 Pp. 49-79. December 2014.

<sup>7</sup> Westphalian system and the recognition that the principle of sovereignty can be found in Westphalian Treaties of Münster and Osnabrück.

<sup>8</sup> [http://legacy.icao.int/icao/en/hist/stamps/1919\\_the\\_paris\\_convention.htm](http://legacy.icao.int/icao/en/hist/stamps/1919_the_paris_convention.htm) [Accessed 2 April 2014].

<sup>9</sup> S. J. Fox. CONTEST'ing Chicago origins and reflections: *lest we forget!* Int. J. Private Law, Vol. 8, No. 1, Pp. 73-98 (2015).

<sup>10</sup> Signed by 27 States on 13 October 1919.

<sup>11</sup> For further discussions see: S. J. Fox (2015) CONTEST'ing Chicago origins and reflections: *lest we forget!* Int. J. Private Law, Vol. 8, No. 1. Pp. 73-98 (2015)

<sup>12</sup> Commonly called the Chicago Convention.

Convention on International Civil Aviation, 7 December, 1944, 15 U.N.T.S. 295, ICAO Doc 7300/9.

<sup>13</sup> S. J. Fox. 'To practise justice and right' – *international aviation liability: have lessons been learnt?* Int. J. Public Law and Policy, Vol. 5, No. 2, 2015

<sup>14</sup> Anthony Arend. *Legal Rules and International Society*, Oxford University Press, (1999) Pp. 208.

<sup>15</sup> Article 1 - 165 *League of Nations Treaty Series*, at 19.

<sup>16</sup> Article 3 Breadth of the territorial sea. United Nations Convention on Laws of the Sea (UNCLOS) of

10 December 1982. 1833 U.N.T.S. 3, 397; 21 I.L.M. 1261 (1982)

<sup>17</sup> Final Act of the United Nations Conference on the Law of the Sea, held at the European Office of the United Nations, at Geneva, from 24 February to 27 April 1958 (with annexed resolutions); and Convention on the High. Geneva, on 29 April 1958. (1958 (I) Vol. 450-1-6465>)

<sup>18</sup> S. Dancko. *De jure principis aereo* (1687).

<sup>19</sup> S. J. Fox. CONTEST'ing Chicago origins and reflections: *lest we forget!* Int. J. Private Law, Vol. 8, No. 1, (2015).

<sup>20</sup> S. J. Fox (2017) THE RISE OF THE DRONES: *Framework and Governance – Why risk it!* 82 J. Air L. & Com. (2017) – In press.

<sup>21</sup> For further discussion on the Chicago Convention see: Sarah Jane Fox. The evolution of aviation in times of war and peace: blood, tears, and salvation. International Journal of World Peace. Vol. XXXI No. 4. Pp. 49-79. December 2014.

S. J. Fox. CONTEST'ing Chicago origins and reflections: *lest we forget!* Int. J. Private Law, Vol. 8, No. 1, Pp. 73-98, (2015).

<sup>22</sup> *The International Air Services Transit Agreement and The International Air Transport Agreement.*

<sup>23</sup> Note: There are other freedoms of the air which have not been added to the Convention and as such, some remain disputed or unaccepted. The freedoms now extend to include nine freedoms;

- Sixth Freedom: whereby an airline has the right to carry traffic between two foreign States, via its own State. This is therefore considered a combination of the third and fourth freedoms.
- Seventh Freedom: permits an airline operating air service (entirely outside the territory of the State of registry) to fly into the territory of another State and there discharge, or take on-board, traffic coming from or destined for, a third State or States.'

See. C.N. Shawcross and K. M. Beaumont (1977) AIR LAW, Vol. 1, 4<sup>th</sup> edn., Butterworth, London and Air Law 37, 4<sup>th</sup> ed. (2007). Also below at **footnote 27** re Eight and Ninth Freedoms.

<sup>24</sup> International Civil Aviation Organization – ICAO website; [www.icao.int](http://www.icao.int) [Accessed 11 April, 2015]

<sup>25</sup> Michael Milde, ESSENTIAL AIR AND SPACE LAW. 43 (Eleven International Publishing, The Hague, Netherlands. 2<sup>nd</sup> ed. 2012).

<sup>26</sup> See Manual on the Regulation of International Air Transport, ICAO Doc. 9626, at 4.1-10.

Ronald I. C. Bartsch. *International Aviation Law*. (Ashgate, 2012) wherein, a more simplistic definition by providing that, it as '[t]he right to transfer passengers or cargo between two points in a foreign country.'

<sup>27</sup> Ruwantissa Abeyrante states that cabotage is covered by the so-called Eight Freedom of the Air. This refers to the scheduled international air services, 'of transporting cabotage traffic between two point in the territory of the granting State on a service which originates or terminates in the home country of the foreign carrier or (in connection with the so-called Seventh Freedom of the Air) outside the territory of the granting State (also known as Eight Freedom Rights or "consecutive cabotage").'

Abeyrante also describes the ninth freedom as:

'The right or privilege of transporting cabotage traffic of the granting State on a service performed entirely within the territory of the granting State.' This is also known as 'stand-alone' cabotage.

Ruwantissa Abeyrante. *Aeronomics and Law – Fixing Anomalies*. (Springer, 2012).

<sup>28</sup> B. Cheng, *The Law of International Air Transport*. (Stevens & Sons. London, 1962)

J. Wassenbergh, *Principles and Practices in Air Transport Regulation*. (Presses de l'Institut de Transport Aérien, Paris. 1992). D. T. Arlington, "Liberalization of restriction on foreign ownership in US carriers: the United States must take the first step in aviation globalization." Journal of Air Law and Commerce 59, 133-181 (1993). M. Staniland, The vanishing national airline? European Business Journal 10, 71-77 (1998). P. Haanappel, "Airlines ownership and control, and some related matters." Air and Space Law 26, 90-104 (2001). A. Mendelsohn, "Myths of International Aviation." Journal of Air Law and Commerce 68, 519-535 (2003). Mendes de Leon, P. Establishment of air transport undertakings—Towards a More Holistic Approach. Journal of Air Transport Management 15, 96-1010 (2009).

<sup>29</sup> Sarah Jane Fox, *The evolution of aviation in times of war and peace: blood, tears, and salvation*. International Journal of World Peace. Vol. XXXI No. 4 Pp. 49-79. December 2014.

<sup>30</sup> Financial Times Lexicon <http://lexicon.ft.com/Term?term=globalization> [Accessed 3 April, 2015]

<sup>31</sup> OECD (2010) *Making Global Policy Cooperation Happen* November 2010. Online [www.oecd.org](http://www.oecd.org) [Accessed 14 March 2015]

<sup>32</sup> Mancur Olson *The Logic of Collective Action: Public Goods and the Theory of Groups*. (1965)

<sup>33</sup> *De Monarchia* (1300s).

<sup>34</sup> New World Order (1940) Accessible at

[http://www.voltairenet.org/IMG/pdf/Wells\\_New\\_World\\_Order-3.pdf](http://www.voltairenet.org/IMG/pdf/Wells_New_World_Order-3.pdf) [Accessed 12 April, 2015]

<sup>35</sup> Catherine Barnard, *The Substantive Law of the EU – The Four Freedoms*. (Oxford University Press, 2004).

<sup>36</sup> Paul Craig and Gráinne De Búrca, *EU Law – Text, Cases and Materials* 4<sup>th</sup> Ed. (Oxford University Press, 2008).

<sup>37</sup> Ibid. Referring to W. Lipgens (ed.) *Documents of the History of European Legislation* (European University Institute, 1985).

<sup>38</sup> S. J. Fox (2016) BREXIT: A bolt from the blue! – *Red sky in the morning? Issues in Aviation Law and Policy*. Volume 16, No. 1. Autumn, 2016, pp 83-119.

See also the Blog from the London School of Economics by Revd. Adrian Low:

<http://blogs.lse.ac.uk/brexit/2016/10/24/brexit-is-not-the-will-of-the-british-people-it-never-has-been/>

<sup>39</sup> Nick Clegg, “UK must reject EU insularity and chauvinism” 20 May, 2014. BBC News online <http://www.bbc.co.uk/news/uk-politics-27479277>

<sup>40</sup> The Research and Studies Centre on Europe <http://www.robert-schuman.eu/en/declaration-of-9-may-1950> [Accessed 10 February 2015]

<sup>41</sup> By France, Germany, Italy and the Benelux countries. Signed: 18 April 1951

Entered into force: 23 July 1952. Expired: 23 July 2002.

<sup>42</sup> Signed: 25 March 1957 Entered into force: 1 January 1958 by the six founding Member States: Belgium, Germany, France, Italy, Luxembourg, Netherlands.

<sup>43</sup> EU Law – Text, Cases and Materials 4<sup>th</sup> Ed. (Oxford, 2008).

<sup>44</sup> Bela Balassa, *The Theory of Economic Integration*. (London, Allen & Unwin, 1961). See Routledge Revivals.

<sup>45</sup> Catherine Barnard, *The Substantive Law of the EU – The Four Freedoms*. (Oxford University Press, 2004).

<sup>46</sup> Adapted from Dr Sarah Jane Fox PhD thesis, (free movement and international law) [2009].

<sup>47</sup> As acknowledged by EU Commission (specifically in this instance in relation to transport by road) within their publication, ‘Road Transport, Europe on the move.’ Luxembourg 2004, ISBN 92-894-6649-9.

<sup>48</sup> Title V – Articles 70-80 TEC (Ex. Title IV – Articles 74-84). Within the Treaty of Lisbon this changed to Title VI, (Articles 90-100, TFEU).

<sup>49</sup> European Transport policy for 2010: time to decide. Brussels, 12.9.2001 COM (2001) 370 final. Policy guidelines of the White Paper, page 6.

<sup>50</sup> CJEU, Case 13/83 European Parliament v Council [1985] ECR 1513, paras 46-50.

<sup>51</sup> Ibid. (At the operative part of the judgment) Namely; “that in breach of the Treaty the Council has failed to ensure freedom to provide services in the sphere of international transport and to lay down the conditions under which non-resident carriers may operate transport services in a Member State.” (As stated in relation to road transport)

The Treaty of Maastricht later reinforced this principle. Treaty on European Union, Official Journal C191, 29 July 1992.

<sup>52</sup> COM(85)310 final. ‘Completing the Internal Market: White Paper from the Commission to the European Council’ (Milan, 28-29 June 1985).

<sup>53</sup> This shows the ‘discretionary’ aspect regarding both sea and air transportation.

<sup>54</sup> European Commission (2011). Flightpath 2050: Europe’s Vision for Aviation.

<sup>55</sup> Replacing Regulation 2407/92, 2408/92, 2409/92 as of 1 November 2008.

<sup>56</sup> Regulation (EC) No. 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community. OJ L 293, 31/10/2008 Pp. 3-20.

<sup>57</sup> ICAO, *Manual on the Regulation of International Air Transport* 2.2-2 (2004).

<sup>58</sup> IATA Agenda for Freedom is a statement of policy principles by several States with an aim to set a more liberal guiding principles in the implementation of Air Transport. The multilateral Statement of Policy Principles was signed by seven countries of Bahrain, Chile, European Commission, Kuwait, Lebanon, Malaysia, New Zealand, Panama, Qatar, Singapore, Switzerland, United Arab Emirates and USA on 16 November 2009 at Montebello, Canada. The document was later adopted by ICAO during its 37<sup>th</sup> Assembly.

<sup>59</sup> S. J. Fox & R. Ismail (2017) *The skies the limit! – Open Skies with limitations*. *European Journal of Comparative Law and Governance*. Vol. 4, 2017, 7-42.

<sup>60</sup> See EU Commission website DG Move at [https://ec.europa.eu/transport/modes/air/25years-eu-aviation\\_en](https://ec.europa.eu/transport/modes/air/25years-eu-aviation_en)

<sup>61</sup> Article 281 EC has been repealed but is replaced in substance by Article 47 TEU.

<sup>62</sup> Article 218 TFEU.

<sup>63</sup> Fox, S. J. (2014) 'Security: *The influence of 9/11 to the EU Framework.*' *Research in Transportation Economics* – Special Edition DOI: 10.1016/j.retrec.2014.07.004  
Vol. 45 (2014), Pp. 24–33.

<sup>64</sup> Formally ECJ (before the Lisbon Treaty).

<sup>65</sup> Case C-466/98 *Commission v. United Kingdom* [2002] ECR I-9427; Case C-467/98 *Commission v. Denmark* [2002] ECR I-9519; Case C-468/98 *Commission v. Sweden* [2002] ECR I-9575; Case C-469/98 *Commission v. Finland* [2002] ECR I-9627; Case-471/98 *Commission v. Belgium* [2002] ECR I-9681; Case C-472/98 *Commission v. Luxembourg* [2002] ECR I-9741; Case C-475/98 *Commission v. Austria* [2002] ECR I-9797; Case C-476/98 *Commission v Germany* [2002] ECR -9855.

<sup>66</sup> 1/76 *On the Draft Agreement Establishing a Laying-up Fund for Inland waterway Vessels* [1977] ECR 741. (Opinion given pursuant to Article 228(1) of the EEC Treaty).

<sup>67</sup> 1/94 *Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property, WTO* [1994] ECRI-5267. (Opinion given pursuant to Article 228(6) of the EC Treaty).

<sup>68</sup> Case 22/70 *Commission v. Council* [1971] ECR 263.

<sup>69</sup> Article 49 TFEU.